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No. 97-1055

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FINOVA CAPITAL CORPORATION
SUCCESSOR IN INTEREST TO
BELL ATLANTIC TRICON LEASING CORPORATION,
Petitioner,

v.

LIFECARE X-RAY, INC.; HELARION A. BERONILLA, JR.; NARCISA LIPANA; CHARLES CHANG; SAMUEL FLANNAGAN; YAHYA FADL; BARID B. JANA; PAUL DASCANI; GREGORY SPAIN; WILLIAM HUGHES; LIFECARE LABORATORIES, INC.; and LIFECARE CARDIAC CENTER, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA PITTSBURGH

SUPPLEMENTAL BRIEF OF PETITIONER

David Lowe Robinson
101 West Pittsburgh Street
Greensburg, PA 15601
(724) 836-4300

Counsel for Petitioner

February 27, 1998

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AUTHORITY FOR SUPPLEMENTAL BRIEF

This Supplemental Brief is being filed pursuant to Rule 15.8.

The Petition for a Writ of Certiorari was filed with the Court on December 18, 1997. On January 13, 1998, this Court filed its Opinion in *Baker v. General Motor Corp.* _____ U.S. _____ (1998).[1] The *Baker* case is believed to be highly relevant to the question presented to this Court. The Baker case was not cited by the Respondents in their Brief filed on February 6, 1998.

SUPPLEMENTAL STATEMENT OF THE CASE

This Appeal is taken from the affirmation by the Superior Court of Pennsylvania of the Lower Court's Opinion and Order dated March 26, 1996. App. 13a.-25a. Prior to the final Order which has been appealed, the Lower Court issued two preliminary Opinions and Orders which are now included in the Supplemental Appendix.[2]

The first preliminary Opinion was rendered in connection with the issuance of the Rule to Show Cause why the Judgment should not be opened or stricken. Your Petitioner filed Preliminary Objections setting forth service on all of Respondents and acknowledgement of the California action by Robert Blum, Attorney for all of the Respondents at the time. The first lower Court Opinion and Order dated May 19, 1994, dismissed the Preliminary Objections and proceeded to order issuance of the Rule to Show Cause why the Judgment should not be opened or stricken. Supp. App. 1a-5a. By Order dated June 24, 1993, the court denied Petitioner's request for security for the stay ordered on May 19, 1993. R-27a. By stipulation of the parties the court was requested to consider the effect in Pennsylvania of sub-paragraph (c) [3] of each judgment entered by the California Court relating to notice requirements under The Uniform Commercial Code. Supp.

1. References to this case in this Supplemental Brief are styled as *Baker* with reference to the slip opinion of each Justice.

2. References to the Supplemental Appendix in this Supplemental Brief are styled "Supp. App. _a".

App. 6a-8a. Your Petitioner argued (a) that the reference to §9504 was in error as to the leases entered into after January 1, 1991, (b) that the specific reference to "commercially reasonable" under §9504 did not include the notice requirement and (c) that only the money judgment was transferred to Pennsylvania and not the enforcement provisions. The lower court by Opinion and Order dated January 2, 1995, determined that all of these arguments were without merit. Supp. App. 9a-11a. The lower court then went on to consider the notice sent the Respondents in light of California Law in its Final and Appealable Opinion and Order dated March 26, 1996. App. 13a-25a. The Order of the Pennsylvania Superior Court denying reconsideration is also included in the supplemental appendix. Supp. App. 12a.

DISCUSSION

The *Baker* case provides an excellent review of the full faith and credit command. The Pennsylvania courts have not acted in accordance with the wisdom provided. California entered money judgments against the Respondents. Pennsylvania concedes that these are valid final judgments. Lower Court Opinion, App. 16a. The California court in addition to the money judgment issued the ground work for reclaiming the equipment within California. As to each lease the California Order provided in Paragraph 3, *inter alia:*

> "For an order that the items of equipment. . . be delivered to Plaintiff. App. 36a, 37a, 38a.

This order would lay the groundwork in California to obtain possession of the equipment, if necessary. If the equipment was sold in California under the Order, an issue might arise under California law as to the interpretation of the phrase "in a commercially reasonable manner as provided by Commercial Code §9504". App.36a-38a. The equipment was not delivered to the Plaintiff in California and no process issued from the California courts to enforce delivery of possession.

The preclusive effect of your Petitioner's judgment in California established contractual money damages that your Petitioner was owed for defaults under the various equipment leases, *inter alia:*

1) $252,039.23 by Lifecare Laboratories, Inc. and its guarantors;

2) $276,868.04 by Lifecare Cardiac Center, Inc. and its guarantors;

3) $592,213.27 by Lifecare X-Ray, Inc. and its guarantors.

These judgments were for specified dollar amounts and are not modifiable other than by payments made voluntarily, through execution or sale of the leased equipment. Your Petitioner has always maintained that these were final judgments entitled to full faith and credit.

Justice Ginsburg in *Baker* states:

> Regarding judgments, however, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (res judicata) purposes, in other words, the judgment of the rendering State gains nationwide force. (Citations and Footnote omitted.) *Id.,* slip op. at 9.

That nationwide force of the judgment can be implemented by the interstate registration procedure provided for in the Revised Uniform Enforcement of Foreign Judgments Act. *Id.* Ginsburg, slip op. at 11 n. 8.

The California judgment was so registered by Petitioner in Pennsylvania. The Uniform Enforcement of Foreign Judgments Act adopted by Pennsylvania, 42 Pa. C.S.A. § 4306, App. 45a-46a, is also exacting. The definition of "foreign judgment" means "*any judgment,* decree or order of a court of the United States or of any court *requiring the payment of money* which is *entitled to full faith and credit* in this Commonwealth." (emphasis added) *Id.* § 4306(f) App. 46a

Upon proper filing in Pennsylvania under the Uniform Act the status of the foreign judgment is defined:

> The clerk shall treat the foreign judgment in the same manner as a judgment of any court of common pleas of this Commonwealth. A judgment so filed shall be a lien as of the date of filing and shall have the same effect and be subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of any court of common pleas of this Commonwealth and may be enforced or satisfied in like manner. *Id.* § 4306(b). App. 45a.

Justice Ginsburg in *Baker* further states:

> Full faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister State judgment as preclusive effects do; such measures remain subject to the even-handed control of forum law. *See McElmoyle ex rel. Bailey v. Cohen,* 13 Pet. 312, 325 (1839) (judgment may be enforced only as "laws [of enforcing forum] may permit"); see also Restatement (Second) of Conflict of Laws §99 (1969) ("The local law of the forum determines the methods by which a judgment of another State is enforced."). (footnote omitted). Ginsburg, slip op. at 11.

See also concurring Opinion of Justice Scalia. *Id.* Scalia, slip op. at 1.

When the California judgment was entered the contract merged with the judgment and the choice of laws provisions of the contract ceased to be applicable. Restatement (Second) of Conflict of Laws §95 cmt. c(1969). The language of Paragraphs 3 in the California Order only provided for judicial enforcement action within the boundaries of California. "Orders commanding action or inaction have been denied enforcement in a sister State when they purported to accomplish an official act within the exclusive province of that other State. . . ." *Baker,* Ginsburg, slip op. at 11.

Once the California judgment was properly registered in Pennsylvania only the money judgment was available to your Petitioner in Pennsylvania for execution. 42 Pa. C.S.A. § 4306 App. 45a-46a.

Your Petitioner could not have used the California Order in Pennsylvania as a basis for the issuance of any writ other than normally provided for under Pennsylvania execution procedures. No writs or execution relative to the leased equipment were issued in Pennsylvania. The Defendants did not deliver the equipment to the Plaintiff in Pennsylvania. Your Petitioner reclaimed its equipment under the Lifecare X-Ray, Inc. lease, in place, at the former offices of Lifecare X-Ray, Inc. located in Pennsylvania notwithstanding an attempted distraint for rent by the Landlord. R 50a-51a.

The Lifecare Cardiac equipment was purchased by one of the guarantors [not one of the respondents] after the Motion to Open or Strike was filed and after a new Notice of Intention to Proceed with Private Sale was given. App. 56a-59a. The Lifecare Laboratories equipment was similarly sold after the Motion to Open or Strike and again with a new Notice of Intention to Proceed with Private Sale. App. 60a-63a.[3] Notwithstanding the new notices the lower court purports by its Order of March 26, 1996, to "bar" your Petitioner from further proceedings to enforce any of the judgments registered in Pennsylvania including the Lifecare Cardiac and Lifecare Laboratories claims. App. 24a-25a

Pennsylvania's order "barring" your Petitioner from "seeking deficiency judgments" is inconsistent with the status of the record. Your Petitioner is not "seeking deficiency judgments" but the right to enforce properly registered and valid Pennsylvania judgments. After denying the Respondents Motion to Open or Strike Judgment the Pennsylvania lower court without forewarning "enjoined" your Petitioner from proceeding with execution on the validly registered judgments. The Respondents did not request an injunction, no evidentary

3. These notices were provided to meet the objections being raised in the Motion to Open or Strike even through your Petitioner does not believe they were required under the California Order.

hearing was held to support a permanent injunction and your Petitioner was never provided an opportunity to raise equitable defenses.[4] Most importantly the Respondents never alleged and the court never found that the Respondents would be entitled to injunctive relief in California. Restatement (Second) of Conflicts of Laws § 115 cmt. e(1969). See Cal. Civ. Proc. Code § 473 (West 1997) [Six month period within which to bring motion to vacate judgment in California had expired when Respondents filed their Motion in Pennsylvania in March, 1994.]

As the basis for its "sanction", the Pennsylvania court in issuing its own injunction construed the language of Paragraph 3 of the California Order as an injunction requiring action by your Petitioner. In *Baker* this Court has indicated:

> Sanctions for violations of an injunction, in any event, are generally administered by the court that issued the injunction. *See, e.g., Stiller v. Hardman,* 324 F. 2d 626, 628 (CA2 1963) (non-rendition forum enforces monetary relief portion of a judgment but leaves enforcement of injunctive portion to rendition forum). *Id.* Ginsburg, slip op. at 12-13.

Justice Kennedy concurring in *Baker* has also noted Michigan's comity concerns in connection with a potential modification of an injunction by the court which entered it. Justice Kennedy stated:

> It reflects Michigan's determination that, within the State of Michigan itself, respect for the issuing court and judicial resources are best preserved by allowing the issuing court to determine whether the injunction should apply to further proceedings. *Id.* Kennedy, slip op. at 8.

Pennsylvania has made a similar determination by a long line of case law with regard to the transfer of judgment from one county to another county within Pennsylvania. In *Selden v. Jackson,* 169 A.2d 301 (Pa. 1961) the court quoted with

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4. Lifecare Laboratories, Inc. and Lifecare Cardiac Center, Inc. were not parties to the Motion which purported to grant them relief. See Petitioner's Brief, Page 7. See also Petition for Rule to Show Cause R-5a.

approval from *First National Bank & Trust Co. of Bethlehem v. Laubach,* 5 A.2d 139 (Pa. 1939):

> It has been held time and again that the court of the county to which the judgment is transferred has no power over it except for purposes of execution, and cannot inquire into its merits. That can be done only by the court in which it was originally obtained: *King v. Nimick,* 34 Pa. 297; *Mellon v. Guthrie,* 51 Pa. 116; *Beck v. Church,* 113 Pa. 200; *Nelson v. Guffey,* 131 Pa. 273; *Lehigh & New England R.R. Co. v. Hanhauser,* 222 Pa. 248; *Shotts & Co. v. Agnew & Barnett,* 81 Pa. Superior Ct. 458, 461. 169 A.2d at 301, 302.

In *Binenstock Trust,* 190 A.2d 288 (Pa. 1963) the court stated:

> It is well established that orderly judicial procedure dictates that the court which first acquires jurisdiction over a matter be permitted to decide all questions relating thereto. 190 A.2d at 291.

Cited with approval in *Tallarico v. Bellotti,* 200 A.2d 763, 765 (Pa. 1964). See also *Tabas v. Robert Development Company,* 297 A.2d 481, 484 (Pa. Super. 1972).

If courts in Pennsylvania are deemed inappropriate for modifying a judgment or order of the issuing court from a sister county there would appear to be no grounds or justification for permitting the local court of Westmoreland County, Pennsylvania, to modify a judgment rendered by the court of Orange County, California (if an interpretation or modification of the California judgment is even required). Pennsylvania precedent does provides that the validity of a foreign judgment should be decided by the courts of the rendering State. In *Barnes v. Buck,* 346 A.2d 778 (Pa. 1975) the court stated:

> 12. Even had the divorce decree not been challenged and upheld by the courts of Ohio, a collateral attack upon it by a plaintiff in the courts of this Commonwealth would not normally be entertained. Although the full faith and credit clause does not require a sister State to give a greater, more conclusive or more final

> effect to a foreign judgment or decree than would be given it by the courts of the rendering State, see the Act of June 25, 1948, note 4 *supra,* 28 U.S.C. § 1738; and Restatement (Second) of Conflict of Laws § 115 and Comment *b* thereto (1971), principles of interstate comity would indicate abstention by Pennsylvania courts in favor of the courts of the rendering State, in light of their special competence to pass upon the validity of the public acts, records and judicial proceedings of that State. Thus a party seeking relief in our courts on the basis of asserted invalidity (other than jurisdictional) of the judicial proceedings of another State should normally be relegated to the courts of that State for the establishment of the invalidity. 346 A.2d at 783 n.12.

This rule should be made a part of the national jurisprudence and not merely be relegated to comity.

This case stands as a testimonial of failure to preserve judicial resources by not requiring the defendants to return to the issuing court to raise questions concerning the interpretation and validity of the California Order (if such a determination is even deemed to be necessary). [3 years in the lower courts and 2 years on appeal].

In the event this Court should determine that the validity of the California judgment can properly be reviewed by the Pennsylvania courts, it is this Court's obligation to determine how the highest Court of California would decide the issue. "[This Court] cannot decline to inquire into these state-law questions when inquiry will obviate new extensions or exceptions to full faith and credit." *Baker,* Kennedy, slip op. at 6. "Full faith and credit measures the effect of a judgment by all the laws of the rendering State, including authoritative ruling of that State's highest court on questions of issue preclusion and jurisdiction over third parties." *Id.* Kennedy, slip op. at 7. See *Barber v. Barber,* 323 U.S. 77,81. (1944) [It is the duty of this Court upon an independent investigation, to determine for itself the law of the rendering state.]

Again to the extent that it is necessary to consider the effect of Paragraph 3 of the California Order, this case can answer the questions which have vexed the scholars and the authors of the Restatement. *Baker,* Kennedy, slip op. at 3,4.

Finally, the Pennsylvania Courts have stood any notion of a public policy exception on its head and reversed the usual role of the non-rendering State in refusing to enforce a judgment as hostile to policies reflected in the judgment of another State. *Estin v. Estin,* 334 U.S. 541, 546 (1948). The Respondents appear to assert that the "local statutes and practices" of Pennsylvania under 13 Pa. C.S.A. § 9504 support "barring" the Petitioner's judgments under the case law of Pennsylvania's highest court in *Savoy v. Beneficial Consumer Discount Company,* 468 A.2d 465 (Pa. 1983). Respondents' Brief at 17. Quite to the contrary, the Pennsylvania Supreme Court rejected the "Absolute Bar Rule" in favor of the rebuttable presumption and stated:

> We believe that the latter approach, [rebuttable presumption] which was adopted by Superior Court in the instant case, is the more enlightened and equitable. The former approach, [the Absolute Bar Rule], foreclosing a creditor from the possibility of securing any deficiency judgment, would provide the debtor with a windfall relief from his obligation while extinguishing a creditor's right to recover sums truly owed. 468 A.2d at 467.

To the extent that Paragraph 3 of the California Order has any relevance in Pennsylvania, the Pennsylvania courts in the instant case have flown in the face of the more enlightened and equitable rule of Pennsylvania (local statutes and practices) and provided the Respondents with a windfall relief extinguishing judgments which are truly owed.

CONCLUSION

This Court notes that 44 States and the District of Columbia have adopted the Revised Uniform Enforcement of Foreign Judgments Act for the interstate registration of judgments.[5] This Act was adopted by Pennsylvania and used by your Petitioner. Guidance from this Court would be beneficial in clarifying the respective rights and obligations which inure to the parties when a proper registration is made under the Uniform Enforcement of Foreign Judgment Act and will help take the important law of registering interstate judgments into the Twenty-First Century. The Pennsylvania courts have erred in "barring" the enforcement of final judgments properly registered. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

David Lowe Robinson
101 West Pittsburgh Street
Greensburg, PA 15601
(724) 836-4300
Counsel for Petitioner

February 27, 1998

5. *Baker*, Ginsburg, slip op. at 11, n.8.

SUPPLEMENTAL APPENDIX

Supplemental Appendix "A"

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION

BELL ATLANTIC TRICON LEASING CORPORATION, Plaintiff	:	
vs.	:	No. 2616 of 1993
JAMES E. NICOLETTE, FRANK SANTAMARIA; FRANK V. MAIDA; ROBERT A. HOLST; HELARION A. BERONILLA, JR.; NARCISA LIPANA; CHARLES CHANG; SAMUEL FLANAGAN; JOHN R. KENNERDELL; DOMINIC W. DILEO; YAHYA FADL; ANGEL BALCITA; BARID D. JANA; PAUL DASCANI; GREGORY SPAIN; WILLIAM HUGHES; LIFECARE LABORATORIES, INC.; LIFECARE CARDIAC CENTER, INC., and LIFECARE X-RAY, INC., Defendants	:	

OPINION

This matter comes before the Court upon the Petitions for Issuance of a Rule to Show Cause why the Judgment entered should not be Opened filed by James E. Nicolette, Frank Santamaria, Frank V. Maida, Robert A. Holst, Helarion A. Beronilla, Jr., Narcisa Lipana, Charles Chang, Samuel Flanagan, Yahya Fadl, Angel Balcita, Barid D. Jana, Paul Dascani, Gregory Spain, William Hughes, and Lifecare X-Ray, Inc.

Also before the Court are the Plaintiff's Preliminary Objections in the nature of a Demurrer to the Petitions for Issuance of a Rule and a Motion for Sanctions against the Defendants James E. Nicolette, Frank Santamaria, Frank V. Maida, Robert A. Holst, Helarion A. Beronilla, Jr., Narcisa

Lipana, Charles Chang, Samuel Flanagan, Yahya Fadl, Angel Balcita, Barid D. Jana, Paul Dascani, Gregory Spain, and William Hughes.

A default judgment was entered against the Defendants, January 26, 1993 in Orange County, California. (See Plaintiff's entry of Judgment pursuant to Uniform Enforcement of Foreign Judgments Act, Exhibit A). Judgment was entered for damages, attorney's fees, and delivery of specified personalty and equipment. The Order provided that upon delivery, the Plaintiff shall sell or dispose of the personal property in accordance with Commercial Code §9504.

In April, 1993, the judgment was transferred to Westmoreland County, Pennsylvania. The Defendants were given notice of the entry of the judgment.

By letter, February 10, 1994, the Defendants were notified that the equipment and personal property had been sold by the Plaintiff and a deficiency existed. Interrogatories in Aid of Execution were provided the Defendants by the Plaintiff. As a result, the Defendant presented the within Petition to Open Judgment based upon the failure of the Plaintiff to comply with the provision of the default order; the failure to provide notice of the sale in accordance with §9504.

The Plaintiff argues that the Defendants' Petitions do not state a cause of action and fail to set forth a valid defense to the judgment. The Plaintiff's position is that the judgment is based upon the failure of the Defendants to make payments pursuant to various leases, not based upon the resale of equipment.

A Petition to Open Judgment must set forth averments that demonstrate a meritorious defense, the petition was promptly filed, and provide a reasonable excuse as to why a timely answer was not filed. *See Cross v. 50th Ward Community Ambulance Serv.*, 365 Pa. Super. 74, 528 A.2d 1369 (1987).

The Plaintiff argues that the Defendants have not set forth any explanation as to why the Complaint was not

answered or as to why there was a delay in failing the Petition to Open. Therefore, the Plaintiff requests that the Petitions be dismissed.

The Petitions were promptly filed by the Defendants upon notice that a sale had been conducted. Further, the alleged failure to provide notice of the sale in accordance with §9504 is an absolute defense to the deficiency judgment. *See In re Kirkland,* 915 F.2d 1236 (9th Cir. 1990). An issue exists as to whether the Defendants had notice of the sales and therefore, have an absolute defense to the deficiency judgment under California Law. *See Kirkland* at 1241.

The Court will enter the following Order:

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION

BELL ATLANTIC TRICON LEASING CORPORATION, Plaintiff	:	
vs.	:	No. 2616 of 1993
JAMES E. NICOLETTE, FRANK SANTAMARIA; FRANK V. MAIDA; ROBERT A. HOLST; HELARION A. BERONILLA, JR.; NARCISA LIPANA; CHARLES CHANG; SAMUEL FLANAGAN; JOHN R. KENNERDELL; DOMINIC W. DILEO; YAHYA FADL; ANGEL BALCITA; BARID D. JANA; PAUL DASCANI; GREGORY SPAIN; WILLIAM HUGHES; LIFECARE LABORATORIES, INC.; LIFECARE CARDIAC CENTER, INC., and LIFECARE X-RAY, INC., Defendants	:	

ORDER OF COURT

AND NOW, to wit, this 19th day of May, 1994, the Petitions for Issuance of a Rule to Show Cause why the Judgment entered should not be Opened filed by James E. Nicolette, Frank Santamaria, Frank V. Maida, Robert A. Holst, Helarion A. Beronilla, Jr., Narcisa Lipana, Charles Chang, Samuel Flanagan, Yahya Fadl, Angel Balcita, Barid D. Jana, Paul Dascani, Gregory Spain, William Hughes, and Lifecare X-Ray, Inc. are granted.

The Preliminary Objections of the Plaintiff in the nature of a Demurrer are denied.

The Plaintiff's Motions for Sanctions against the Defendants James E. Nicolette, Frank Santamaria, Frank V. Maida, Robert A. Holst, Helarion A. Beronilla, Jr., Narcisa Lipana, Charles Chang, Samuel Flanagan, Yahya Fadl, Angel Balcita,

Barid D. Jana, Paul Dascani, Gregory Spain, and William Hughes are denied without prejudice.

Rule is entered upon the Plaintiff to show cause why Judgment should not be opened and/or stricken. A Hearing is scheduled for Wednesday, August 31, 1994 at 11:00 a.m. All execution and attachment proceedings are stayed pending further Order of Court.

BY THE COURT

/s/ Bernard F. Scherer, Judge

Bernard F. Scherer, Judge

ATTEST:

/S/ Ron Diehl

Prothonotary

Supplemental Appendix "B"

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

BELL ATLANTIC-TRICON LEASING CORPORATION, Plaintiff	:	
vs.	:	No. 2616 of 1993
JAMES E. NICOLETTE, FRANK SANTAMARIA; FRANK V. MAIDA; ROBERT A. HOLST; HELARION A. BERONILLA, JR.; NARCISA LIPANA; CHARLES CHANG; SAMUEL FLANAGAN; JOHN R. KENNERDELL; DOMINIC W. DILEO; YAHYA FADL; ANGEL BALCITA; BARID D. JANA; PAUL DASCANI; GREGORY SPAIN; WILLIAM HUGHES; LIFECARE LABORATORIES, INC.; LIFECARE CARDIAC CENTER, INC., and LIFECARE X-RAY, INC., Defendants	:	

ORDER OF COURT

AND NOW, to wit, this 23rd day of June, 1995, upon motion of David L. Robinson, Esquire, Attorney for Plaintiff, it is hereby ORDERED that the letter of Donald P. Tarosky, Esquire, dated August 31, 1994, and attached hereto and marked Exhibit "A", is and shall become a part of the record.

BY THE COURT:

/s/ Bernard F. Scherer

ATTEST:

Prothonotary

EXHIBIT "A"

Donald P. Tarosky
Attorney at Law
126 North Maple Avenue
Greensburg, Pennsylvania 15601-2579

Telephone: (412) 836-1720
Telecopier: (412) 836-3911

August 31, 1994

Honorable Bernard F. Scherer
Court of Common Pleas of Westmoreland County
Westmoreland County Courthouse
Courthouse Square
Greensburg, PA 15601

RE: Bell Atlantic Tricon v. James E. Nicolette, et.al.
No. 2616 of 1993

Dear Judge Scherer:

Following our status conference today, all attorneys met in your courtroom with regard to framing the preliminary issue to be decided by this Court. It is the intent of the parties to have this issue decided thereby giving direction to the parties with regard to further discovery and litigation. With the consent of all parties, the issue to be decided is as follows:

> "What effect, if any, does subparagraph (c) of each judgment entered by Judge David H. Brickner of the Superior Court of the State of California have on the notice requirements of the Uniform Commercial Code?"

October 25, 1994, has been established by the Court as the date for oral argument on this issue. All counsel have agreed to a briefing schedule, subject to approval by this Court, such that briefs of the defendants would be filed and served on or before September 26, 1994, and brief of the plaintiff would be filed and served on or before October 14, 1994. If this is not acceptable to the Court, all counsel have agreed to comply with any briefing schedule that may be established by the Court. As indicated in the status confer-

ence, the submission of this issue to the Court for decision is not intended to waive any other issues or arguments counsel for plaintiff or defendants may have in this matter.

I am sending a copy of this letter to all counsel, with the understanding reached at the status conference, that if any party does not agree that this letter accurately sets forth the issue to be decided, the briefing schedule or any other matter set forth herein, such party would notify the Court and all other counsel in writing as soon as possible following receipt of this letter.

Certainly, if the Court has any questions or further direction with regard to this matter, all parties have agreed to promptly respond to any inquiries.

If anything further is needed at this time, please notify me accordingly. Otherwise, I will proceed with preparation of my brief in accordance with the schedule set forth above.

Very truly yours,

/s/ Donald P. Tarosky

Donald P. Tarosky

cc: David L. Robinson, Esquire
F. Scott Gray, Esquire
Robert Blum, Esquire
Kimberly J. Gallagher, Esquire

Supplemental Appendix "C"

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION

BELL ATLANTIC TRICON LEASING CORPORATION, Plaintiff	:	
vs.	:	No. 2616 of 1993
JAMES E. NICOLETTE, FRANK SANTAMARIA; FRANK V. MAIDA; ROBERT A. HOLST; HELARION A. BERONILLA, JR.; NARCISA LIPANA; CHARLES CHANG; SAMUEL FLANAGAN; JOHN R. KENNERDELL; DOMINIC W. DILEO; YAHYA FADL; ANGEL BALCITA; BARID D. JANA; PAUL DASCANI; GREGORY SPAIN; WILLIAM HUGHES; LIFECARE LABORATORIES, INC.; LIFECARE CARDIAC CENTER, INC., and LIFECARE X-RAY, INC., Defendants	:	—

OPINION

This matter comes before the Court upon the Petition to Open and/or Strike Judgment of the Defendants.

This opinion arises from a submission by the parties and is entered solely for the purpose of determining whether the notice requirements of the California Uniform Commercial Code have any effect upon the judgment transferred to Pennsylvania. The resolution of this submission is dispositve of further proceedings, discovery, and/or the issues joined in this case.

The original Order, entering default judgment against the Defendants in California (hereinafter referred to as the "California order"), provides:

> Upon delivery of possession, Plaintiff shall sell or dispose of the personal property in a commercially reasonable manner as provided by Commercial Code Section 9504.

The position of the Defendants is that the Plaintiff disposed of the collateral without providing proper written notice to the Defendants. Therefore, the Defendants maintain that under California law and the California order, they cannot be held liable for any deficiency judgment representing the difference between the amount of the judgment and the amount the Plaintiff received from the disposition of the collateral.

The Plaintiff responds with several arguments. First, the Plaintiff maintains that the present matter involved equipment leases and therefore, §9504 cannot apply. The Plaintiff also argues that §9504 has two components, notice to a debtor and a requirement that the creditor proceed in a commercially reasonable manner in the disposition of the collateral. The Plaintiff contends that the California order only provides that the collateral be disposed of in a "commercially reasonable manner" and does not specifically include the notice requirements. Finally, the Plaintiff suggests that only the money judgment was transferred to Pennsylvania and the requirement to perform in accordance with §9504, was not transferred to Pennsylvania. These arguments are without merit.

Full faith and credit must be given to the California order which was transferred in its entirety. The equipment lease contracts from which this controversy arises provide that California law was to govern all aspects of the subject leases.

Regardless of whether the equipment leases at issue are secured transactions under the California Commercial Code, the California order imposes the requirements of California Commercial Code, §9504. The plain language of the California order requires that the Plaintiff be held to the provisions of §9504, in its entirety.

Further, California courts have held that the disposition of collateral in a commercially reasonable manner requires notice. *Backes v. Village Corner, Inc.*, 197 Cal. App.3d 209, 242 Cal. Rptr. 716 (1987).

The Court will enter the following Order:

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION

BELL ATLANTIC TRICON LEASING CORPORATION, Plaintiff	:	
vs.	:	No. 2616 of 1993
JAMES E. NICOLETTE, FRANK SANTAMARIA; FRANK V. MAIDA; ROBERT A. HOLST; HELARION A. BERONILLA, JR.; NARCISA LIPANA; CHARLES CHANG; SAMUEL FLANAGAN; JOHN R. KENNERDELL; DOMINIC W. DILEO; YAHYA FADL; ANGEL BALCITA; BARID D. JANA; PAUL DASCANI; GREGORY SPAIN; WILLIAM HUGHES; LIFECARE LABORATORIES, INC.; LIFECARE CARDIAC CENTER, INC., and LIFECARE X-RAY, INC., Defendants	:	

ORDER OF COURT

AND NOW, to wit, this 2nd day of January, 1995, the Court finds that the notice requirements of the California Uniform Commercial Code §9504 govern the California order and judgment and this Court is bound to accord the provisions of the California Uniform Commercial Code §9504 full faith and credit.

BY THE COURT

/s/ Bernard F. Scherer

Bernard F. Scherer, Judge

ATTEST:

/s/ Ron Diehl

Prothonotary

Supplemental Appendix "D"

The Superior Court of Pennsylvania
Office of the Prothonotary

1015 GRANT BUILDING
PITTSBURGH, PENNSYLVANIA 15219

DAVID A. SZEWCZAK, ESQUIRE
PROTHONOTARY (412) 565-7592

ELEANOR R. VALECKO
DEPUTY PROTHONOTARY

March 25, 1997

David Robinson, Esquire
101 West Pittsburgh Street
Greensburg, PA 15601

IN RE: Finova Capital Corporation, et al v. James E. Nicolette, et al
Nos. 129 and 729 Pittsburgh 1996

Dear Mr. Robinson:

The Court has entered the following Order on your Motion for Reargument in the above-captioned matter:

"ORDER OF COURT

The court hereby denies the application filed January 29, 1997 requesting reargument or reconsideration of the decision dated January 14, 1997.

DATE: March 25, 1997 PER CURIAM"

Very truly yours,

/s/ Eleanor R. Valecko

DEPUTY PROTHONOTARY

ERV:mlh
cc: Honorable Bernard Scherer
Dennis Shean, Esquire
Robert Blum, Esquire
Frederick Gray, Esquire
Donald Tarosky, Esquire